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(1) Supreme Court, U.S.
FILED

09-85 JUN 26 2009

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

HANI CHEN,

Petitioner

v.

THE CITY OF NEW YORK, BELL ATLANTIC CORP., CONSOLIDATED EDISON OF NEW YORK INC. AND THE BROOKLYN UNION GAS COMPANY

Respondents

On Petition For Writ Of Certiorari
To The State Of New York Court Of Appeals

PETITION FOR WRIT OF CERTIORARI
And APPENDIX VOLUME 1 OF 1

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QUESTIONS PRESENTED

Petitioner brought an action against the City of New York for damages resulting from a slip and fall accident. During trial defendants presented no evidence disputing the existence of a significantly sized pothole, and did not make any argument that the area was reasonably safe. The defense claimed the injury was the result of plaintiff's own negligence, and did not dispute the condition of the sidewalk. The jury returned a verdict finding that the area was reasonably safe despite the lack of evidence or argument presented by the defense. The question presented is:

1. Whether a jury verdict finding an area reasonably safe, despite no dispute from the-defense as to the existence of a dangerous situation, satisfies the due process clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is Ms. Hani Chen, the plaintiff in the original action.

Respondents are the City of New York, Bell Atlantic Corp, Consolidated Edison of New York, Inc., and the Brooklyn Union Gas Company. Defendants.

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THE CITY OF NEW YORK, BELL ATLANTIC CORP., CONSOLIDATED EDISON OF NEW YORK INC. AND THE BROOKLYN UNION GAS COMPANY

Respondents

On Petition For Writ Of Certiorari
To The State Of New York Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Hani Chen, pursuant to the Rules of the Supreme Court, respectfully petitions for a writ of certiorari to review the judgment of the New York State Court of Appeals.[1]

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[1] Rule 10(b) of the Rules of the Supreme Court. A state court of last resort has declined to hear an important federal question in a way that conflicts with the decision of another state court or of a US Court of Appeals.

BRIEF FOR THE PETITIONER

OPINIONS BELOW

1. State of New York, Court of Appeals,
   April 2, 2009, ordered that petitioner Hani Chen's motion for leave to appeal to the Court of appeals is denied. MO.NO.187

2. Supreme Court of the State of New York,
   Appellate Division: Second Judicial Department
   Argued on May 15, 2008
   Judgment entered on September 16, 2008, Ordered that the judgment of the Supreme Court, Kings County (Balter, J.), dated November 14, 2006, is affirmed. INDEX NO. 157664/2000

3. Supreme Court of the State of New York,
   County of Kings
   Judgment entered on November 14, 2006, dismissing the complaint in its entirety.
   INDEX NO. 157664/2000

JURISDICTION

An order from the New York State Court of Appeals was entered on April 2, 2009. This Court has jurisdiction for this case pursuant to Rule 10 of the Rules of the Supreme Court of the United States of America. A state court of last resort has declined to hear an important federal issue that conflicts with another state court of last resort or of a US Court of Appeals.

STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution.

STATEMENT

1. Background

On April 15, 1999, at approximately 8:30 p.m., Hani Chen, the petitioner and plaintiff in the original action, suffered serious permanent injuries when she was caused to trip and fall due to a pothole in the crosswalk of a roadway. A notice of claim was timely served on the City of New York. An action was commenced by summons and complaint and issue was joined by service of an answer. A bill of particulars was served. The case proceeded to a bifurcated trial before Honorable Bruce M. Balter in the county of Kings, New York.

2. Unchallenged Existence of Dangerous Situation

On November 10, 1998, the Big Apple Pothole and Sidewalk Corporation ("Big Apple") filed a map and legend with the New York City Department of Transportation. The map and legend were admitted into evidence. Andrea Kinloch, the assistant director at Big Apple, testified at the trial. (Testimony p 34-54) The map showed the subject crosswalk at the intersection of Nostrand Avenue and Crown Street bearing the symbol of a box with a line to another box indicating an extended section of pothole on the westside of Nostrand Avenue between the northwest and southwest corners. (Big Apple Map)

Photographs in evidence show significant potholes in the crosswalk. These potholes are full

fledged potholes of significant depth and dimensions. These potholes are marked on the Big Apple map.

Plaintiff, Hani Chen, also testified in unchallenged fashion that the pothole was 2-3 inches deep and that the photographs in evidence accurately depicted the condition of the crosswalk where she fell. (Trial Minutes - 55-72)

This testimony and evidence regarding the existence of these potholes is undisputed by defendants.

3. Defense

The defense did not challenge or dispute the existence of the potholes in the street where Hani Chen fell and suffered her injuries. The defense relied upon three contentions – none of which challenged the fact that the crosswalk was unsafe. (Trial Minutes - 150-163)

The first contention involved causation. Defendant called Dr. Michael Katz to testify on the issue of causation. His testimony only related to an explanation of the condition known as "syncope." Defense tried to show that an episode of syncope caused the fall. (Trial Minutes - 126-139)

The second contention involved prior written notice of the dangerous situation. There was no dispute as to whether the potholes and the dangerous condition actually existed. This contention dealt only

with whether the City had notice of such dangerous situation.

The third contention involved contributory negligence of the plaintiff. Again, no dispute was made as to the reasonable safeness of the crosswalk. Rather a question was posed as to what fault does the plaintiff bear in the happening of her own accident.

The defense never challenged the existence of potholes in the dangerous crosswalk. The defense never contended that the crosswalk was reasonably safe. The only evidence presented to the jury about the condition of the crosswalk was undisputed testimony, pictures, and a Big Apple map that indicated large potholes existed on the crosswalk.

4. Jury Charge and Verdict

Standard jury charges for a City roadway defect trip and fall case were given pertaining to negligence: prior written notice, causation and comparative fault. The jury never reached these issues.

The first interrogatory for the jury: "Was the area reasonably safe where Hani Chen's accident occurred?" The jury determined that the roadway was reasonably safe. Issues of causation, prior written notice and contributory negligence were not addressed by the jury.

The jury charge states: "the defendant contends that any trip and fall accident or accidents had by plaintiff occurred because the plaintiff had a medical condition that caused her to become dizzy and lose consciousness." (Trial Minutes - 183)

> The jury charge later states:
> "The defendant claims that that they did not cause the accident, but the plaintiff did. And the defendant says that even if they did, the plaintiff also caused the accident.
>
> The plaintiff has the burden of proving that the defendant was negligent and that the defendant's negligence was a substantial factor in causing the accident.
>
> The defendant has the burden of proving that the plaintiff was negligent and that the plaintiff's negligence was a substantial factor in causing the accident."

There was no dispute regarding the existence of a dangerous condition. The dispute was only in regard to causation, prior written notice and contributory negligence.

5. City's Summation Regarding Question One

Question One of the jury charge dealt with whether the area where plaintiff fell was reasonably safe. Question One did not deal with causation, prior written notice or contributory negligence.

In defense's summation, Counsel briefly addressed Question One:

> "Now, the first question deals with whether the area where she claims she fell was reasonably safe. And then it goes on to ask about the notice question in question two. And then it goes on to the adequacy of the warning the City could have provided. And then it asks about whether the negligence claim that they have against us was the substantial factor in the accident happening. And then it deals with the issue of whether the plaintiff has fault.
>
> Now, if you believe, the accuracy and truthfulness of what's contained in these hospital records, and there is a clear dispute between what's here and how this described her state at the time and how the accident happened and what she said in the context of this suit, but if you believe this, if you believe that she got dizzy and she fell in the street, then you don't even have to deal with these questions. You can just answer no to question one and the case is over." (Trial Minutes - 160)

In addressing Question One, the question dealing with the reasonable safety of the area, defense Counsel does not contend that the sidewalk was reasonably safe. Defense Counsel points to plaintiff's contributory negligence and causation as his argument in favor of the jury finding the area

reasonably safe. No dispute about the condition of the sidewalk is made, no statement about the safety of the area is made. Defense Counsel instructed the jury to answer Question One, a question about the reasonable safety of the area, based upon whether they felt plaintiff fell due to becoming dizzy and falling in the street.

REASONS FOR GRANTING THE PETITION

1. New York Recognizes Inherently Dangerous Conditions As A Matter of Law

New York Courts have frequently ruled that an area can be inherently dangerous as a matter of law. In *Ewanitsko v. Verdi Equities, Inc.*, 19 A.D.3d 538, 796 N.Y.S.2d 531 (2nd Dept. 2005). In *Ewanitsko*, a slip and fall case, the jury found that the dance floor upon which plaintiff slipped was safe. The court held:

> "The verdict in favor of the defendant could not have been reached on any fair interpretation of the evidence, and was thus against the weight of the evidence (see Nicastro v Park, 113 AD2d 129, 134 [1985]). Based on the evidence presented, it cannot fairly be concluded that the area of the dance floor upon which the plaintiff Joanne Ewanitsko slipped and fell was in a reasonably safe condition. Consequently, the motion to set aside the verdict should have been granted.

Ewanitsko is right on point with the case at hand. As a matter of law, it cannot fairly be concluded that the area of the sidewalk containing the potholes where Hani Chen fell was in a reasonably safe condition.

New York courts have held in various situations that negligence as a matter of law exists. In *Nicastro v. Park*, the court set aside a jury verdict in favor of defendants in a medical malpractice case finding that "the record was so replete with evidence of negligence...". *Nicastro v. Park*, 113 A.D.2d 129, 495 N.Y.S.2d 184 (2nd Dept. 1985), at 191. *See also, Sun v. Cold Spring Harbor Laboratory*, 30 A.D.3d 582, 818 N.Y.S.2d 772 (2nd Dept. 2006); *Zachara v. Occidental Chemical Corporation*, 144 A.D.2d 926, 534 .N.Y.S.2d 32 (4th Dept. 1988); *Cicione v. Meyer*, 33 A.D.3d 646 (2nd Dept. 2006).

"A jury verdict may be set aside and a new trial may be granted when the jury's determination is palpably incorrect and a substantial injustice done if the verdict were sustained." *Farruch v. Board of Education of City of New York*, 227 A.D.2d 440, 643 N.Y.S.2d 118 (2nd Dept. 1996).

2. No Dispute As To Dangerous Condition

As noted in the statement above, the defense did not dispute the existence of a dangerous condition. Evidence was presented that demonstrated potholes existed on the sidewalk where the injury occurred. The defense relied upon causation, contributory negligence and lack of prior

written notice as their defense. It is well settled that broken pavement can be unreasonably dangerous. [2] Federal court, in a premise liability case, has mentioned that "broken pavement can be unreasonably dangerous." *Wood v. RIH Acquisitions MS II LLC*, 556 F.3d 274, at 280.

In the case of *Yadegar v. International Food Market*, 28 A.D.3d 475, 813 N.Y.S.2d 477 (2nd Dept. 2006), plaintiff was injured when she tripped off an area of raised and broken asphalt in the defendant's parking lot. The jury found that an unsafe condition existed, but that the defendant was not negligent. The court reversed and set aside the reversed and set aside the jury verdict due to the "plaintiff's uncontradicted testimony."

Federal courts are also willing to overturn jury verdicts if, in light of all the evidence, no reasonable jury could reach the conclusion of the jury. In *Walker v. Bd. of Regents of the Univ. of Wisconsin Sys.*, 410 F.3d 387, 393 (7th Cir.2005). An appeals court is "obliged to leave the judgment undisturbed unless the moving party can show that `no rational jury could have brought in a verdict against [it].'" *Woodward v. Corr. Med. Servs. of Illinois, Inc.*, 368 F.3d 917, 926 (7th Cir.2004). As there was no evidence presented to contradict the existence of a dangerous situation, no rational jury could have

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[2] In *Wood v. RIH Acquisitions MS II LLC*, 556 F.3d 274, at 280, a premises liability case, the court mentioned that "broken pavement can be unreasonably dangerous."

brought forth a finding of reasonable safety in the crosswalk where Hani Chen was injured.

3. Absent A Dispute Of A Dangerous Condition, Jury Cannot Find An Area Reasonably Safe

Absent the dispute of the defense, a jury cannot find that a condition is reasonably safe. As New York courts have regularly held that an area can be unsafe as a matter of law, it is the plaintiff's right to have this jury verdict overturned. Federal courts have ruled that a judgment may be overturned if no rational jury could have reached such conclusion. A rational jury could not reach a judgment that was not in dispute and which no contradicting evidence was submitted.

A jury may not reject unrebutted testimony. There must be a basis for the jury's disbelief, either from other conflicting testimony, evidence or cross examination. *Prescott v. Le Blanc*, 669 N.Y.S.2d 432 (3rd Dept. 1998). *See also*, *Haut v. New York City Housing Authority*, 2 A.D.3d 492, 768 N.Y.S.2d 497 (2nd Dept. 2003); *Dellamonica v. Carvel Corp.*, 1 A.D.3d 311, 766 N.Y.S.2d 854 (2nd Dept. 2003).

Federal courts have held that "mere scintilla of supporting evidence will not suffice." *Millbrook v. IBP*, 280 F.3d 1169, 1173 (7th Cir.2002).

4. Fourteenth Amendment, Due Process

The Fourteenth Amendment to the United States Constitution grants a plaintiff the right to

procedural due process. No state shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV §1.[3]

New York state courts have held that dangerous conditions exist as a matter of law. A jury verdict finding an area reasonably safe, when no evidence was presented by the defense, and no dispute as to the dangerous condition existed, violates a plaintiff's right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and applied to the states.

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[3] U.S. CONST. amend XIV §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW M. KENNEDY
KENNEDY LAW OFFICE

CERTIFICATE OF COMPLIANCE

No. _____

HANI CHEN,

Petitioner

v.

THE CITY OF NEW YORK, BELL ATLANTIC CORP., CONSOLIDATED EDISON OF NEW YORK INC. AND THE BROOKLYN UNION GAS COMPANY

Respondents

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 2,436 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33(d).

Executed on June 26, 2009

Andrew M. Kennedy
Member of the Bar of The United States Supreme Court

In the Supreme Court of the United States

NO._____

HANI CHEN,

Petitioner

V.

THE CITY OF NEW YORK, BELL ATLANTIC CORP., CONSOLIDATED EDISON OF NEW YORK INC. AND THE BROOKLYN UNION GAS COMPANY

Respondents

On Petition For Writ Of Certiorari
To The State Of New York Court Of Appeals

APPENDIX VOLUME 1 OF 1

State of New York
Court of Appeals

At a session of the court, held at Court of Appeals Hall in the City of Albany On the second day of April, 2009

Present, HON. JONATHAN LIPPMAN, *Chief Judge,* ***presiding***

Mo. No. 187
Hani Chen,
Appellant,
v.
City of New York,
Respondent,
et al.,
Defendants

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars and costs necessary reproduction disbursements.

/s/ Stuart M. Cohen
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

___ AD3d___ Argued – May 15, 2008

Robert A. Lifson, J.P.
Anita R. Florio
Edward D. Carni
Ariel E. Belen, JJ.

2006-10857 Decision & Order
Hani Chen, appellant, v. City of New York, Respondent, et al., defendants.

(Index No. 15766/00)

Ephrem J. Wertenteil, New York, N.Y., for the appellant

Michal A. Cardozo, Corporation Counsel, New York, N.Y. (Kristin M. Helmers and Norman Corenthal of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of a judgment of the Supreme Court, Kings County (Balter, J.), dated November 14, 2006, as, upon a jury verdict, is in favor of the defendant City of New York and against her, dismissing the complaint insofar as asserted against the defendant.

ORDERED that the judgment is affirmed insofar as appealed from, without costs or disbursements.

The contentions raised by the plaintiff do not require reversal.

Lifson, J.P., Florio, Carni and Belen, JJ, concur.

Enter:
/s/James Edward Pelzer
Clerk of the Court

September 16, 2008

CHEN v. CITY OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

_____x **Index # 15766/2000**

Hani Chen

Plaintiff **JUDGMENT**

-against-

The City of New York, Bell Atlantic Corp., Consolidated Edison of New York, Inc. And The Brooklyn Union Gas Company,

Defendants.

_____x

The issues in the above entitled action having duly come on trial before the Hon. Bruce M Balter, and a Jury at a Term Part 9, of this Court held at the Courthouse thereof, located at 360 Adams Street, Brooklyn, New York, on the 25th and 26th days of September 2006 and the plaintiff, Hani Chen, having appeared by her attorney JONATHAN D'AGOSTINO, and the defendants, the City of New York, Bell Atlantic Corp., having appeared by their attorneys, Michael Cardozo – the Corporation Counsel, and Landman, Corsi Ballaine & Ford, and respectively, and the issues having been duly tried, and a verdict by the jury in favor of the defendants and against the plaintiff, and the court, pursuant to its order of September 26, 2006, the transctipt of which is attached hereto, having found that the area where Hani Chen's accident took place was reasonably safe thus, finding for the defendants, and that the complaint against defendants Brooklyn Union Gas Co and Consolidated Edison having been

dismissed on summary judgment, as per order dated 9/16/2005.

NOW THEREFOR, it is ADJUDGED that the defendants have a judgment dismissing the complaint in its entirety.

ENTER:

Judgment entered this 14 day
Of November, 2006

/s/Nancy T. Sunshine
Clerk